

FCC MAIL SECTION

Before the
Federal Communications CommissionWashington, D.C. 20554
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DISPATCHED BY PR Docket No. 93-38 ✓

In the Matter of

Amendment of the Commission's RM-8017
Rules to Permit Private Carrier
Paging Licensees to Provide
Service to Individuals

NOTICE OF PROPOSED RULE MAKING

Adopted: February 23, 1993; Released: March 12, 1993

Comment Date: April 12, 1993

Reply Comment Date: April 27, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Rule Making filed by the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER) to permit private carrier paging systems to provide paging service to individuals.¹ Comments in support of the petition have been submitted by Paging Network, Inc., PageMart, Inc., PacTel Paging, Inc., and Telocator. We have received no comments in opposition to the petition.

2. After consideration of the NABER petition and related comments, we propose to amend our rules as requested. This proposed rule making would amend Part 90 of the Commission's rules² to enable paging licensees at

929-930 MHz and in the Business Radio Service to provide private carrier paging service to individuals as well as other currently eligible users.

II. BACKGROUND

3. Part 90 of our rules currently authorizes private carrier paging (PCP) licensees³ to offer paging services on a commercial basis, but only to end users who are themselves eligible for licensing under Part 90 and to the federal government.⁴ Because Part 90 eligibility is limited to businesses, state and local government agencies, public safety organizations, and other defined entities, private individuals who do not qualify as business licensees are not eligible for a Part 90 license, and therefore are not allowed to obtain paging service from a PCP system. The effect of this rule is to prevent individuals seeking paging service for a non-business purpose from obtaining that service from a private carrier.

4. The Commission first authorized PCP channels in the 929-930 MHz band in 1982.⁵ At that time, we envisioned PCP service primarily as a cost-effective means for businesses and government entities to obtain paging service without having to build in-house paging systems. Under the Commission's original rules, therefore, eligibility for PCP service was limited to Part 90 eligibles only. Similarly, our then-existing rules in the Business Radio Service allowed paging licensees to provide service only to other businesses who were themselves eligible for a Business Radio license.

5. In 1989, we initiated a rule making (PR Docket No. 89-45) to enlarge the class of eligible PCP end-users to include both individuals and the federal government.⁶ We also proposed to extend the same eligibility rules to PCP systems in the Business Radio Service.⁷ In the *Notice*, we pointed out that these proposals were consistent with our 1988 decision to expand user eligibility in the Specialized Mobile Radio (SMR) service.⁸ We further noted that Congress had given the Commission broad authority in the Communications Amendments Act of 1982 to expand eligibility in the private radio services to the largest feasible number of users.⁹

6. We concluded our rule making in January 1991 and issued a *Report and Order* that amended the PCP user

¹ The Petition was filed on June 4, 1992. By Public Notice dated June 23, 1992 (Rep. No. 1897), we requested interested parties to file comments on the Petition within thirty days.

² In our recently initiated "refarming" rule making, we have proposed to replace the current Part 90 in its entirety with a new Part 88. See *Notice of Proposed Rule Making*, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992). However, aside from this transposition, the refarming rule making does not propose any change to the rules that are the subject of this proceeding. Should the refarming proposal be adopted prior to a decision in this proceeding, we will amend this proposal to refer to the appropriate sections of Part 88. Otherwise, any changes made to Part 90 as a result of this proceeding will be incorporated into the refarming proposal to the extent it is ultimately adopted.

³ As used herein, the term "private carrier paging" is intended to encompass PCP service above 900 MHz, governed by Part 90, Subpart P, as well as paging-only channels below 900 MHz in the Business Radio Service, governed by Part 90, Subpart D. Although Subpart D does not refer specifically to "private carrier" paging, licensees under both subparts are authorized to provide commercial paging service to identical categories of eligible users.

⁴ 47 C.F.R. §§ 90.75(c), 90.494(a).

⁵ *First Report and Order*, Gen. Docket No. 80-183, 89 FCC 2d 1337 (1982); *Second Report and Order*, Gen. Docket No. 80-183, 91 FCC 2d 1214 (1982). Initially, ten of these channels were allotted to PCP service, while thirty were set aside for non-commercial use by Part 90 eligibles to meet their internal paging needs. In 1985, in response to growing demand for private carrier channels, the Commission reallocated the 929-930 MHz channels to make twenty channels available for PCP use, and authorized PCP sharing of the non-commercial channels. *Report and Order*, PR Docket 85-102, 58 RR 2d 1290 (1985).

⁶ *Notice of Proposed Rule Making*, Amendment of Part 90 of the Commission's Rules to Expand Eligibility and Shared Use Criteria in the Private Land Mobile Services, PR Docket No. 89-45, 4 FCC Rcd 2589 (1989).

⁷ *Id.* at para. 16.

⁸ *Id.* at para. 17 (citing *Report and Order*, Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), *aff'd Memorandum Opinion and Order*, 4 FCC Rcd 356 (1988)).

⁹ *Id.* at para. 18.

eligibility rules to their present form.¹⁰ First, we concluded that PCP systems had the capacity to accommodate additional users on existing channels without any deterioration in service.¹¹ We further concluded that Part 90 eligibles and the federal government would benefit from having the expanded paging service options that PCP licensees could provide.¹² However, we elected not to extend user eligibility to include individuals. Our reasoning was that at the time there was not a sufficient showing of need for paging services by individuals that could not be satisfied by existing options.¹³

III. DISCUSSION

7. After analysis of the current state of the paging industry and review of NABER's petition and associated comments, we have tentatively concluded that we should revisit our prior decision not to allow individuals to use PCP services. First, the rapid growth in demand for paging services suggests that individual users would benefit from being able to choose between private and common carrier paging alternatives. Second, allowing individual access to PCP services would remove an unnecessary barrier to the ability of PCP systems to compete fully in the paging marketplace. Finally, we see no countervailing benefit to the public from retaining the current rule.

8. The comments in support of the NABER petition uniformly attest to the fact that public demand for paging services is increasing rapidly.¹⁴ As paging technology has become less costly and more widely available, use of pagers has spread well beyond small, specialized groups of users. Increasingly, paging services are being sold on a mass-market basis through large retail distributors, catalogue companies, and similar outlets.¹⁵ According to a recent survey, the number of pagers in service grew by nearly 20 percent in 1991, from approximately 9.9 million to 11.8 million.¹⁶ At this rate of growth, industry analysts project that as many as 20 million units could be in service by the mid-1990s.¹⁷ Moreover, while the majority of paging use is for business purposes, an increasing percentage of individual users are seeking service for private, non-business uses, such as communicating with family members.¹⁸

9. Given the current rapid expansion of the paging market, it is likely that individual demand for paging services will increase in the future. However, the prohibition

against individual use of PCP services forces individuals who want paging service for a non-business purpose to use a common carrier paging operator. While the common carrier option may be satisfactory for many individual users' needs, this restriction arbitrarily deprives the user of the opportunity to compare alternatives. In some instances, PCP operators may be able to provide technically superior service at a lower cost.¹⁹ Similarly, because PCP operators are not subject to common carrier regulation, they may be able to offer specialized service tailored to the user's particular needs.²⁰ We believe that individual non-business users would benefit from having these options available to them, just as business users do presently.

10. By proposing to allow individuals to choose between private and common carrier paging service, we not only would further our objective of enhancing consumer choices, but also would remove an unnecessary barrier to competition in the paging marketplace. The existing eligibility rules impose a significant burden on PCP licensees, because they require the screening of potential customers to guard against providing service to individuals for a non-business purpose.²¹ Such verification is difficult under any circumstances, but this requirement has become particularly problematic as paging systems rely increasingly on mass-market distributors to resell their services to paging customers. The intervening link in the distribution chain requires PCP licensees to impose resale restrictions on their paging units, while at the same time making it difficult for licensees to verify or control who ultimately uses those units or for what purpose.²²

11. According to comments, the practical result of these limitations has been to constrict the availability of PCP services to the public, including currently eligible users. Because of the resale restrictions involved, some retail outlets and distributors have been reluctant or unwilling to resell PCP services.²³ In addition, the practical difficulty of distinguishing "authorized" from "unauthorized" use by individuals has deterred some PCP licensees from serving any individual customers, including "business individuals" who are eligible under the current rules.²⁴ We believe that eliminating the prohibition on individual non-business use would eliminate these problems, thereby making PCP services more widely available.

¹⁰ *Report and Order, Amendment of Part 90 of the Commission's Rules to Expand Eligibility and Shared Use Criteria in the Private Land Mobile Services ("PCP User Eligibility Order")*, PR Docket No. 89-45, 6 FCC Rcd 542 (1991).

¹¹ *Id.* at para. 10.

¹² *Id.* at paras. 11-14.

¹³ *Id.* at para. 15.

¹⁴ See, e.g., NABER Petition at 4-5, PacTel Comments at 4 n.2, PageNet Comments at 5, PageMart Comments at 13.

¹⁵ See NABER Petition at 4-5, PageMart Comments at 13-14, PageNet Comments at 7-8, PacTel Comments at 4.

¹⁶ "Analyses of Paging Carriers Indicate Strong Growth by Industry in 1991," *Telocator Bulletin*, May 22, 1992, at 4.

¹⁷ See "Survey Shows Paging Growth and Predicts Stable Revenue," *Telocator*, August/September 1992, at 20.

¹⁸ See Telocator Comments at 2. PageNet estimates that ten percent of all paging subscribers are non-business users. PageNet Comments at 7.

¹⁹ For example, PageMart claims to have lowered its costs significantly below those of comparable common carriers by switching from terrestrial radio links to transmission of its

signal via satellite. PageMart Comments at 12.

²⁰ See, e.g., PageMart Comments at 11, PageNet Comments at 8.

²¹ See 47 C.F.R. § 90.403(a) (licensees must exercise "such direction and control as is necessary" to assure that facilities are used only as permitted by the rules).

²² See NABER Petition at 6-7, PageMart Comments at 4-5, PageNet Comments at 5-6.

²³ PageMart Comments at 4-5.

²⁴ Commenters contend that common carrier paging operators have used the rules to "chill" PCP competition by aggressively challenging the eligibility of individuals who are using PCP services for business purposes. NABER Petition at 7, PageMart Comments at 5-6, PageNet Comments at 10-11. Whether or not this is true, we believe that much uncertainty in interpreting and complying with the rules will be eliminated if user eligibility is based on the identity of the user rather than the purpose for which the service is to be used. As long as the current eligibility rules are in effect, however, we admonish common and private carrier licensees alike not to misapply the rules for anti-competitive purposes.

12. In contrast to the competitive benefits that flow from allowing PCP licensees to serve individuals, we perceive no public interest benefit to retaining the existing rule. In light of current paging technology, which can readily accommodate additional users on existing PCP systems, the rule is not necessary to prevent frequency overuse, degradation of service to existing customers, or similar technological problems. Nor does the distinction between individual and non-individual users (or business and non-business users) serve any other positive purpose that we can perceive. The rule appears to be primarily a carryover from the period when our private land mobile user eligibility rules were considerably more restrictive. Many of these rules have now been eliminated with no detriment to service quality, as in our decision in PR Docket 86-404 to allow SMR systems to serve individuals. We believe the same principles that guided our SMR decision are applicable here and that our paging and SMR user eligibility rules should therefore be made consistent.²⁵

13. We also believe that allowing individual use of PCP systems is justified notwithstanding our prior decision not to take this step in PR Docket No. 89-45. In that proceeding, we declined to extend eligibility to individuals primarily because the comments did not demonstrate sufficient need among individuals for private carrier service to justify changing the rule.²⁶ We believe that the NABER petition and supporting comments have amply demonstrated that such a need now does exist in the paging marketplace. Moreover, we believe that the existing rule is now of such questionable utility that the presumption should be against retaining it unless there is a clear affirmative reason to do so.

IV. CONCLUSION

14. In our view, allowing PCP systems to provide service to individuals would serve the public interest by increasing the alternatives in paging services available to consumers and promoting improved technology and increased efficiency through competition. We seek comments on this proposal and will consider alternatives that are consistent with these goals.

V. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

15. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

²⁵ While supporting the proposed rule change, Telocator contends that eliminating user eligibility restrictions for PCP systems may "blur" the distinction between private and common carrier paging, and suggests that we undertake a broader inquiry into the differing regulatory treatment of private and common carriers. Telocator Comments at 2-3. We consider such an inquiry unnecessary in the context of the present proceeding. Our proposal is not intended in any way to alter the private carrier status of PCP systems, nor do we believe it will have the "blurring" effect suggested by Telocator. We have previously explored the legal repercussions of expanding private carrier

B. Initial Regulatory Flexibility Analysis

16. An Initial Regulatory Flexibility Analysis is contained in Appendix B to this Notice.

C. Comment Period

17. Interested persons may file comments on or before April 12, 1993, and reply comments on or before April 27, 1993. For filing requirements, see generally 47 C.F.R. §§ 1.415, 1.419. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. All comments will be available for public inspection during regular business hours in the Dockets Reference Room at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

D. Further Information

18. For further information regarding this Notice, contact David L. Furth, Private Radio Bureau, Policy and Planning Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Donna R. Searcy
Secretary *W7C*

APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

2. 47 C.F.R. § 90.75 is amended by revising paragraph (c)(10) to read as follows:

§ 90.75 Business Radio Service

user eligibility in Docket 86-404, in which we concluded that providing service to individuals would not alter the private carrier status of SMRs. *Report and Order*, Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket 86-404, 3 FCC Rcd 1838 (1988) at paras. 19-25. This conclusion applies with equal force to our current proposal.

²⁶ *PCP User Eligibility Order*, PR Docket No. 89-45, 6 FCC Rcd 542 (1991) at para. 15. In fact, most of the comments in the earlier proceeding related to the non-paging portions of our proposal, and relatively few parties commented on the proposed revisions to our paging rules.

* * * *

(c) * * *

(10) This frequency is assigned only for one-way paging communications to mobile receivers. Only A1D, A2D, A3E, F1D, F2D, F3E, or G3E emissions may be authorized. Licensees may provide one-way paging communications on this frequency to individuals, persons eligible for licensing under subpart B, C, D, or E of this part, and representatives of Federal Government agencies.

* * * * *

3. 47 C.F.R. § 90.494 is amended by revising the third subparagraph of paragraph (a) to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

(a) * * *

Frequencies listed in Pool 2 are available only for shared use by private carrier paging (PCP) licensees in providing one-way paging communications to individuals, persons eligible for licensing under subpart B, C, D, or E of this part, and representatives of Federal Government agencies.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

The Commission proposes to amend Part 90 of its rules to allow private carrier paging systems to provide service to individuals. This change will extend the benefits of private radio communications service to a greater number of users by providing additional service options, and will also increase spectral efficiency by allowing for competition, which spurs technological innovation. This action is intended to remove unnecessary restrictions on the ability of private radio licensees to provide their services.

Legal Basis

The proposed action is authorized under Sections 4(1), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a) (1988).

Reporting, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict with These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Individual paging users would be benefited by this proposal because of the additional options made available to them. Private carrier paging licensees would also benefit from not being required to determine whether customers are using paging services for business or non-business purposes.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

IRFA Comments

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 17 of this Notice.